SUPREME COURT OF NOVA SCOTIA
Citation: *Choyce v. Gaum*, 2023 NSSC 266

Date: 20230831
Docket: *Hfx*, No. 502811
Registry: Halifax

Between:
Sunyata Choyce and Ryan Binder as litigation guardian of Peyton Binder

Plaintiffs

v.

Dr. Errol Gaum

Defendant

Decision on Costs Following Application for Class Action Certification

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	By written submissions
Final Written Submissions:	August 18, 2023
Counsel:	Jamie MacGillivray, for the Plaintiffs Michael Brenton, for the Defendant

By the Court:

[1] This was an application for class action certification. In the decision, reported as *Choyce v. Gaum*, 2023 NSSC 177, I dismissed that application. The issue of costs must now be determined.

[2] The parties were provided with a deadline within which to make their submissions on costs (in the event that they were unable to agree to same). That deadline was July 6, 2023. I received submissions on behalf of the Defendant within that timeframe. I heard nothing from the Plaintiffs until I received correspondence from their counsel dated July 21, 2023. At that time, he sought to have the issue of costs heard concurrent with another motion which the Plaintiffs anticipated that they might make. Counsel requested an additional three months' extension within which to prepare cost submissions.

[3] The Court responded to this request as follows:

> I will provide Mr. MacGillivray with an extension to August 18, 2023 to provide written costs submissions … Should costs submissions not be filed by this date, I will proceed to determine the issue without the benefit of same.

[4] The Plaintiffs' submissions were filed on August 18, 2023, as directed. The Defendant argues in his submissions that the Court ought to depart from the tariffs set forth in the *Civil Procedure Rules*, and award a lump sum of $25,000 instead. The Plaintiffs' primary position is that each of the parties should bear their own costs or, alternatively, that the Defendant should receive a modest costs award in accordance with Tariff C.

[5] The only issue to be resolved is the determination of an appropriate award of costs in the circumstances of this case.

The Law

[6] In the aftermath of an application under the *Class Proceedings Act*, SNS 2007, c.28 "... costs may be awarded in accordance with the Civil Procedure Rules" (s. 40(1)).

[7] The process envisioned by the *Civil Procedure Rules* ("CPR") and, in particular, by CPR 77 (and the tariffs) does not replace the Court's longstanding discretion to make any order respecting costs which it is satisfied will do justice between the parties. This is made explicit in CPR 77.02(1).

[8] The Defendant argues that CPR 77.07 and 77.08 also merit consideration in these circumstances:

> 77.07 Increasing or decreasing tariff amount
>
> (1) A judge who fixes costs may add an amount to, or subtract an amount from, tariff costs.
>
> (2) The following are examples of factors that may be relevant on a request that tariff costs be increased or decreased after the trial of an action, or hearing of an application:
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> (a) the amount claimed in relation to the amount recovered;
>
> (b) a written offer of settlement, whether made formally under Rule 10 - Settlement or otherwise, that is not accepted;
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> (c) an offer of contribution;
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> (d) a payment into court;
>
> (e) conduct of a party affecting the speed or expense of the proceeding;
>
> (f) a step in the proceeding that is taken improperly, abusively, through excessive caution, by neglect or mistake, or unnecessarily;
>
> (g) a step in the proceeding a party was required to take because the other party unreasonably withheld consent;
>
> (h) a failure to admit something that should have been admitted.
>
> (3) Despite Rule 77.07(2)(b), an offer for settlement made at a conference under Rule 10 - Settlement or during mediation must not be referred to in evidence or submissions about costs.
>
> 77.08 Lump sum amount instead of tariff
>
> A judge may award lump sum costs instead of tariff costs

[9] It bears emphasis that my overall objective in formulating a costs award is to do justice between the parties. Clearly, I have discretion as to how I attempt to achieve that objective. Both CPR 77 and the tariffs offer guidance as to how that discretion should generally be exercised. Those provisions are presumed to do justice between the parties in the various circumstances to which they speak. Departure from the tariffs, although permitted, should, in my view, only occur when the proponent, in this case the Defendant, satisfies the Court that it is necessary to do so in order to achieve a just result.

[10] Integrally connected with the notion of "justice between the parties" is the principle that a costs award should provide a substantial contribution to the party's reasonable fees and expenses (see, for example, *Canada (Attorney General)* v. *MacQueen*, 2014 NSCA 96; *Landymore* v. *Hardy* (1992), 112 NSR (2d) 410).

[11] On this basis, the Defendant argues:

> Accordingly, a proper costs award must be commensurate with the facts and circumstances of the case, with the ultimate goal being to fashion an award that does justice between the parties. In the instant case, the defendant takes the position that given the unique nature of a certification motion, both in terms of complexity, risk, and the amount of preparation required, this Honourable Court should exercise its discretion to depart from the tariff and grant a lump-sum cost award.

[12] There is precedent for such an approach. The Defendant has cited *Morrison Estate* v. *Nova Scotia (Attorney General)*, 2012 NSSC 386 where MacAdam, J., as he was then, observed:

> 7 It is well known that party-and-party costs "should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding, but should not amount to a complete indemnity": *Landymore v. Hardy* (1992), 112 N.S.R. (2d) 410 (S.C.T.D.) at para. 17; *Williamson v. Williams* (1998), 223 N.S.R. (2s) 78 (C.A.), at para. 24. Where the tariffs fail to meet this standard, a lump sum award of costs may be substituted. The plaintiffs argue that the "unique and important" nature of class proceedings certification hearings suggests a preference for lump sum costs awards, to the extent that it is "extremely atypical" to assess costs according to the tariffs on such motions. The plaintiffs submit that in awarding costs in a class proceeding, the court should assess costs so as to reflect the actual cost of the work done and so as to be comparable to awards made in similar cases. Counsel's submission recognizes that each case, of course, turns on its own facts. The plaintiffs cite *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, 208 O.A.C. 10 (Ont. Sup. Ct. J. (Div. Ct.)), at paras 22 and 40-42; *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 4724 (Ont. Sup. Ct. J. (Div. Ct.)), reversed on other grounds, 2012 ONCA 444; *Lambert v. Guidant Corp.*, 2009 CarswellOnt 8759 (Ont. Sup. Ct. J.); *Andersen v. St. Jude Medical Inc.* (2004), 28 C.P.C. (6th) 199 (Ont. Sup. Ct. J), affirmed 264 D.L.R. (4th) 557 (Ont. Sup. Ct. J. (Div. Ct.)).

[13] Obviously, however, each case must turn upon its own facts. In many situations it will be necessary, within the context of a certification proceeding, to increase the amount for which the tariffs provide in order to achieve the ends of justice. I am not persuaded, however, that a certification motion must invariably trigger such an increase. Nothing in the wording of either CPR 77, or the tariffs themselves, would support such a position.

[14] In *Morrison*, the Court made explicit note of the information provided by Plaintiff's counsel to support its position that it was appropriate to depart from the tariffs in the circumstances of that case:

> 8 Extensive submissions were made by plaintiffs' counsel on the subject of time and effort expended by the plaintiffs in advancing the certification motion. The plaintiffs claim that more than 1000 hours was worked by three lawyers. Because the time is not broken down as between activities in relation to the litigation, there is no way to determine, with any degree of accuracy, how much time related to preparation and conduct of the certification hearing, as opposed to other functions undertaken in this matter. In addition to lawyers' time, there is time claimed for the work of paralegals and assistants.
>
> 9 The plaintiffs say that in the circumstances the recorded time can be adjusted and suggest that the value of the time spent on the file be halved before determining a reasonable award of lump-sum costs. There is, however, also the matter of the hourly rate for the plaintiffs' three solicitors. The defendants cite caselaw referencing hourly rates for counsel in Nova Scotia with experience similar to that of the three counsel who were primarily involved in this matter. The defendants suggest that a review of the cases suggests an hourly rate of approximately half of that sought to be charged by plaintiffs' counsel in this matter. According to the defendants, senior lawyers in Nova Scotia typically charge about $350 per hour, while junior lawyers typically bill in the range $165: see, for instance, *Cherny v. Downie*, 2009 NSSM 54 at para. 30; *Wade (Litigation Guardian of) v. Burrell*, 2011 NSSC 60, at para. 16; *McInnis v. Warnock*, 2010 NSSM 50, at para. 6. As such, the Attorney General says the plaintiffs' costs claim is unreasonable, resting, as it allegedly does, on hourly rates charging twice the average in Nova Scotia.

[15] Next, the Court in *Morrison* laid out the competing arguments:

> 12 The plaintiffs submit that the hearing itself spanned six days over a period of two years. They say they have incurred docketed time in the approximate amount of $478,000.00 and that, while certainly more than half of this time was expended by class counsel in matters related to certification, they only seek partial indemnification based on half of that amount. While that would constitute an adjustment for the amount of time from the total allocated to the certification application, it would not appear to account for any adjustment in the hourly rates to reflect the comments on hourly rates noted in recent Nova Scotia jurisprudence.
>
> 13 The plaintiffs' say they are seeking costs of two thirds of one half of $478,000.00 or therefore the sum of $160,000.00 and in their brief state $10,235.04 for disbursements plus applicable taxes. However, in schedule A to their written submission, the disbursements are calculated at $4,662.34 and together with taxes, they claim disbursements of $5,300.75.

> 14 The defendants submit that the court should award costs based on Tariff C, which the Attorney General calculates on the basis of 3.5 days (rather than 6) at $2,000.00 per day, for a total of $7,000.00 (The defendants note that several of the 6 days involved brief hearings of less than half a day). Alternatively, in the event the court decides to award lump-sum costs, the defendants suggest that the Tariff C calculation be multiplied by two, three or four, as provided in the Tariff at subsection (4), resulting in an award of between $14,000,00 and $28,000.00.

[16] So too, in *MacQueen v. Sydney Steel Corp*., 2012 NSSC 461; rev'd 2014 NSCA 96. At the trial level, it was observed:

> [36] The motion involved 20 court days and 13 discovery days. Based on Tariff 'C' I think we can consider that amount of time and it can be helpful. I would knock one day, a court day as I said, because of the amended motion, so I would be doing it on the basis of 19 court days and 13 discovery days. Incidentally, I don't disagree with what Justice MacAdam said in the recent decision in **Morrison Estate v. Nova Scotia (Attorney General)** 2012 NSSC 386, and I know that two of the parties here were parties to that decision - I don't know if the Attorney General of Canada is familiar with that decision or not - it's a recent decision of Justice MacAdam on costs in a certification hearing. . . .
>
> [37] And the Attorney General of Nova Scotia was involved. He indicated in that case essentially that costs on certification motions are not to be simply mathematical calculations using Tariff 'C' and I don't disagree with that, but I think that some reference to Tariff 'C' numbers can be helpful.
>
> [38] In my view, if Tariff 'C' were the basis on which the Court was awarding costs, and although I'm not strictly confining my award to a Tariff 'C' basis, I consider there's some guidance there, I would recognize the maximum multiplier of four for the days involved in the hearings. I'd add a 50 per cent premium for the court days, not for the discovery days, but for the court days to recognize the contribution of out-of-town counsel. The result would, therefore using Tariff 'C', be a maximum daily figure of $8,000 plus another $4,000 markup for Ontario counsel which would lead to $12,000 a day. And on $12,000 a day for the cross examinations and the submissions in court, that's 19 days which would be $228,000; I'd add 13 discovery days (although not technically days in court, they were hearing days of one sort) but I would do that at $8,000 because I'm not entirely satisfied that two sets of counsel were needed for all discoveries. That would add another $104,000. That would yield an award of $332,000. That's not the award I'm making, but I'm just saying that that is one of the factors that I considered.

[17] When *MacQueen* reached our Court of Appeal, Farrar, JA overturned the trial judge's decision certifying the class proceedings. In so doing, he was required to grapple with the issue of costs awards against unsuccessful plaintiffs in such proceedings. This is what he said:

[14] While it is true that Courts and commentators alike acknowledge the risks of adverse costs awards undermining the purpose of class proceedings legislation, the 'loser pays' principle continues to apply in the certification context. It is departed from only after consideration of the facts and conduct of the parties. More often consideration of these factors results in a reduction of quantum rather than an order requiring both parties to bear their own costs. [emphasis added]

[15] The Ontario Court of Appeal has repeatedly confirmed that its s. 31 (1) does not displace the "normal rule that costs will ordinarily follow the event" (see **Pearson v. Inco** (2006), 2006 CanLII 7666 (ON CA), 79 O.R. (3d) 427 (C.A.) at ¶13).

. . .

[17] The difficulty with awarding costs against unsuccessful plaintiffs is discussed by Jamie Cassels & Craig E. Jones in their text, **The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada** (Toronto: Irwin Law, 2005) as follows :

> One of the most difficult questions in Canadian class action law involves whether to award costs against unsuccessful plaintiffs. In the United States, Rule 23 has no cost-shifting provisions, adopting the *de facto* "own costs" rule that prevails in that country's courts generally. However, the rules for individual suits in Canada are patterned on England's "loser pays" system.
>
> Awards of costs against unsuccessful representative plaintiffs in class proceedings are necessarily problematic, because the economy of scale is grotesquely reversed. The costs of the defendant's litigation of all classable (i.e. similar) claims can be exacted from a single representative plaintiff whose own interest in the claim might be minimal. Such cost-shifting will presumably deter valid claims from proceeding, routinely permitting defendants to escape the costs of their wrongdoing. While it is conceivable, on the other hand, that "own costs" regimes will encourage illegitimate litigation, the parallel experiences of Ontario and British Columbia (in the latter, an "own costs" presumption applies) do not seem to bear out such concerns, and we are unaware of any suggestion that the rate of frivolous litigation is higher in British Columbia than Ontario.
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> […]
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> The difficulty with cost-shifting rules is that they tend not to consider that the class action is lawyer-driven, not plaintiff-driven. In most class actions, the expenditures by plaintiffs' counsel in simply getting to certification (where cost-shifting is available) will heavily outweigh the expected recovery of the representative plaintiff alone. [pp.370-73] [footnotes omitted]

. . .

[20] Building on this call for balance, the following summary by Perell J. in **McCracken v. Canadian National Railway Co.**, 2012 ONSC 6838, is helpful in

articulating the principles and considerations applicable to costs awards following certification motions:

> 70 […U]under the scheme developed in Ontario for class proceedings, subject to the court's discretion and the directive of s. 31 of the Act, discussed below, the plaintiff remains liable for costs. See *Pearson v. Inco Ltd.* (2006), 2006 CanLII 7666 (ON CA), 79 O.R. (3d) 427 (C.A.) at para. 13; *Attis v. Canada (Minister of Health)*, [2007] O.J. No. 2990 (S.C.J.), aff'd 2008 ONCA 660 (CanLII), [2008] O.J. No. 3766 (C.A.), leave to appeal ref'd, [2008] S.C.C.A. No. 491; *Smith v. The Canadian Tire Acceptance Ltd.* (1995), 1995 CanLII 7163 (ON SC), 22 O.R. (3d) 433 (Gen. Div.) at 449, aff'd (1995), 26 O.R. (3d) 94 (C.A.), leave to appeal to S.C.C. ref'd [1996] S.C.C.A. No. 12; *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 3495 (S.C.J.); *Kerr v. Danier Leather Inc.*, 2007 SCC 44 at paras. 60-71.
>
> 71 The *Class Proceedings Act, 1992* was never intended to insulate representative plaintiffs, or class members, from the possible costs consequences of unsuccessful litigation, and its goal is not to encourage the promotion of litigation; rather, it is designed to provide a procedure whereby courts will be more readily accessible to groups of plaintiffs: S*mith v. Canadian Tire Acceptance Ltd.* (1995), 1995 CanLII 7163 (ON SC), 22 O.R. (3d) 433 at p. 449 (Gen. Div.); aff'd (1995), 26 O.R. (3d) 94 (C.A.); *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, 2008 ONCA 703 (CanLII), [2008] O.J. No. 3997 (C.A) at paras. 28-31.
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> [...]
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> 74 A class proceeding should not become a means for either defendants or plaintiffs to overspend on legal expenses simply because the economies of scale of a class proceeding makes it worthwhile to enlarge the investment in the defence or prosecution of the case: *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONSC 5390 at para. 19. In anticipating costs, a defendant should rein in any tendency to commit more resources than are necessary to fairly test and challenge the propriety of certifying the class proceedings: *Lavier v. MyTravel Canada Holidays Inc.*, 2008 CanLII 44697 (ON SC), [2008] O.J. No. 3377 at paras. 31 and 32; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 1737 (CanLII), [2010] O.J. No. 1243 (S.C.J.).
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> [...]
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> . . .
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> 82 With respect to access to justice, defendants, just as much as plaintiffs, are entitled to access to justice, and the court in exercising its discretion must be aware of the access to justice implications of its award to both plaintiffs and defendants: *2038724 Ontario Limited v. Quizno's Canada Restaurant Corporation*, 2010 ONSC 5390 at para. 17; *Fresco v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1036 at para. 18.

> [...]
>
> 86 Applying the above principles, costs awarded against unsuccessful plaintiffs in certification motions have typically been more modest, relative to the actual costs incurred by the successful defendants, reflecting the concern that cost awards not be inconsistent with the objective of access to justice: *DeFazio v. Ontario (Ministry of Labour)*, [2007] O.J. No. 1975 (S.C.J.) at para. 49; *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2007] O.J. No. 1136 (S.C.J.) at para. 49, leave to appeal ref'd [2007] O.J. No. 2404 (S.C.J.).
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> 87 However, notwithstanding that a certification motion is a mandatory-procedural-interlocutory-non-dispositive motion that does not decide the merits of the case, in absolute terms, very substantial costs awards have been made to successful defendants on certification motions. [Emphasis in MacQueen]

[18] As was also noted in *MacQueen*:

> [37] I also refer to the Alberta Court of Appeal decision in **Pauli v. ACE INA Insurance Co.**, 2004 ABCA 253, leave to appeal ref'd [2004] S.C.C.A. No. 169:
>
> > 33 The chambers judge considered the access to justice issue only in respect of the financial circumstances of the appellants, concluding that because funding was available their access to justice was not compromised. However, access to justice must be viewed in the broader context of the effect of a costs award against citizens who seek to resolve matters affecting society generally. In this case, the chambers judge awarded costs, estimated to be $115,000.00 to $125,000.00, jointly and severally against the appellants, none of whom, individually, would stand to gain more than $1,000.00 compensatory damages in the event of success.
> >
> > 34 Such an award curtails access to justice because it has a chilling affect on future potential litigants. Lawyers and other third parties, who might be willing to underwrite the costs of a potentially meritorious representative action, would be unwilling to do so if they knew they would face crippling costs merely because they offered this financial assistance. Individual litigants, whose stake in the litigation is relatively small, would then be unwilling to pursue the action. [emphasis in *MacQueen*]
>
> [38] I agree. The access to justice issue is much broader than the individual circumstances of the respondents. As noted by the Alberta Court of Appeal, third parties who might be willing to undertake the costs of a potentially meritorious represented action, would be unwilling to do so if they ran the risk of crippling costs awarded against them.
>
> [39] In practice, representative plaintiffs are almost invariably funded by some outside party with an ability to absorb the costs. If such arrangements were to alleviate the access to justice concern, this factor in the analysis would, in effect,

> become illusionary. I do not see it as such. It remains an appropriate and relevant factor in determining a costs award.
>
> [40] I will take access to justice concerns and public interest into consideration in determining the final award of costs.
>
> *Should the costs award be reduced because of the respondents' conduct in the litigation?*
>
> [41] Although he made a lump sum award, Murphy J. referred to Tariff C amounts in support of the figure he arrived at. In their submissions, both appellants refer to his award. Canada does so by simply importing the $400,000 costs award in its entirety as a reflection of its reasonable expectations. Nova Scotia applies a multiplier of $8000 ($2000 x 4, to account for complexity) to 32 days (19 hearing days and 13 discovery days) for the motion. It then applies a 20% increase to the resulting amount to arrive at $300,000.

[19] Finally, in *MacQueen*, the Court concluded, with respect to the issue of costs:

> [56] I have found that this case engages access to justice, and public interest issues. However, I would not go so far as to give effect to the respondents' submission that there be no order for costs or, in the alternative, a nominal award of costs. In my view, that would not be fair and reasonable in this case given the complexity of the certification hearing, the amount at stake in the litigation and the success of Canada and Nova Scotia.
>
> [57] The amounts being claimed by Canada and Nova Scotia are reasonable as a starting point. But that does not end the analysis. I then must take into account any reduction for access to justice and public interest issues. In my view, the appropriate approach is that taken by the Ontario Court of Appeal in **Smith v. Inco Ltd.**, 2013 ONCA 724, leave to appeal ref'd [2014] S.C.C.A. No. 36 where the Court of Appeal endorsed the trial judge's approach of, essentially, discounting the successful defendant's bill of costs by a percentage to take into account the public interest element of the litigation. In that case, the court applied a 50% discount.

[20] Merely to reference the foregoing is to acknowledge the significant differences between the above cases, and the one at bar. Here, I am left with the objective fact that the matter took less than one day of court time to argue. I may look at the court file and observe the briefs filed, and the other indicia of work product, but no records of time spent by the Defendant's counsel have been provided, let alone sworn evidence with respect to same. Nor does the Defendant advert to any of the enunciated factors in CPR 77.07 which could justify an increase with respect to the Tariff amount.

[21] As noted earlier, Rule 40 of the Class Proceedings Act deals with costs in this context:

> 40 (1) With respect to any proceeding or other matter under this Act, costs may be awarded in accordance with the Civil Procedure Rules.
>
> (2) When awarding costs pursuant to subsection (1), the court may consider whether
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> > (a) the class proceeding was a test case, raised a novel point of law or involved a matter of public interest; and
> >
> > (b) a cost award would further judicial economy, access to justice or behaviour modification.
>
> (3) The court may apportion costs against various parties in accordance with the extent of the parties' liability.
>
> (4) A class member, other than a representative party, is not liable for costs except with respect to the determination of the class member's own individual claims. *2007, c. 28, s. 40.*

[22] I agree with the Defendant that this was not a "test case", as the authorities have defined the term. For example, in *Caputo v. Imperial Tobacco Ltd.*, 2005 CanLII 63806 (ONSC), the Court observed:

> 33 . . . A test case involves a resolution of a legal principle. It is not a mere application of principles of law to a given fact situation. This proceeding was not brought to ascertain the state of the law in a particular issue in order that the principle would govern a number of similar actions …

[23] As to "novel point of law", this case did not raise one. Consider *Das v. George Weston Ltd.*, 2018 ONCA, wherein the Court noted:

> 245 … [I]f a legal issue is novel in that , on the current state of the law, either party could have reasonably expected to be successful on the point, the novelty of the claim should play a significant role in fixing costs. However, if the legal point is novel in the sense that it has not been decided in the specific factual context in which it is raised, but the applicable case law and principles pointed strongly towards the outcome eventually arrived at in the proceeding, a claim of novelty will have little or no impact on the costs awarded against the losing party. In cases where there is an element of novelty to the claim, it is for the motion or trial judge to determine where the case fits along the novelty continuum.

[24] Of the factors noted in s.40 (2) (b), in this case it would seem that the most pertinent one is the consideration that the amount of costs awarded should not impair access to justice, nor should it be of an amount which might have a "chilling effect" (as some of the cited authorities have referred to it) with respect to future proceedings. By the same token, I must also bear in mind the considerations prescribed by CPR 77 and the tariffs.

[25] Boiled down to its essentials, the Defendant's argument suggests that I should take notice that, in general, there is a significant amount of additional work involved in responding to an application for certification under the *Class Proceedings Act*. As a consequence (the argument continues) I should recognize that I must depart from the prescribed tariffs. And finally, because $25,000 in costs were awarded following the plaintiff's successful certification motion in *Hayes v. Saint John (City)*, 2017 NB QB 87, and $30,000 was awarded in *Tidd v.New Brunswick*, 2022 NB QB 24, it is argued that it would be appropriate to award $25,000 in costs against the unsuccessful plaintiff in this case.

[26] I can certainly accept that a certification motion is unlike most others because, among other things, it is a mandatory step in a class proceeding. As the Court in *Hayes* pointed out at paragraph 16, "It is also a "do or die" proceeding for the plaintiff because if he/she is not successful the litigation ends." The Defendant(s), on the other hand, must respond "to the extent necessary to fairly test and challenge the propriety of certifying the class proceedings" (per *MacQueen*, para. 20).

[27] With that having been said, I reiterate that it is incumbent upon the party urging the departure from the Tariffs and an award of a lump sum that exceeds what they provide, to do more than this. At a minimum, that party should adduce evidence, in affidavit form, as to the amount of <u>actual</u> time spent in relation to the application, and the amount that the party has incurred in actual legal expense. The Court should also be provided with some evidence which is relevant to a consideration of the reasonableness of the cumulative time expenditure by counsel (for example, printouts of the time records report showing specifically what work was done) and/or, the presence of factors noted in CPR 77.07, if they are said to be present. Absent such evidence, the Court is bereft of anything to suggest that an amount based upon the Tariffs, having due regard to the principles set forth therein, as well as those in s. 40(2) of the *Class Proceedings Act*, would fail to do justice between the parties.

[28] Here, the provisions of Tariff C provide:

> TARIFF C
>
> Tariff of Costs payable following an Application heard
>
> in Chambers by the Supreme Court of Nova Scotia
>
> For applications heard in Chambers the following guidelines shall apply:
>
> (1) Based on this Tariff C costs shall be assessed by the Judge presiding in Chambers at the time an order is made following an application heard in Chambers.

(2) Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted from the costs calculated under Tariff A.

(3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.

(4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending on the following factors:

(a) the complexity of the matter,

(b) the importance of the matter to the parties,

(c) the amount of effort involved in preparing for and conducting the application.

(such applications might include, but are not limited to, successful applications for Summary Judgment, judicial review of an inferior tribunal, statutory appeals and applications for some of the prerogative writs such as *certiorari* or a permanent injunction.)

Length of Hearing of Application	Range of Costs
Less than 1 hour	$250 - $500
More than 1 hour but less than ½ day	$750 - $1,000
More than ½ day but less than 1 day	$1,000 - $2,000
1 day or more	$2,000 per full day

[29] I accept that this is a case in which costs should follow the event. However, under all of the circumstances I have not been satisfied that the application of the provisions of Tariff C to the circumstances of this case would fail to do justice between the parties. Put differently, I have not been satisfied that an award based upon Tariff C would fail to provide the Defendant with a substantial contribution to his reasonable legal fees.

[30] As a consequence, and even though the matter consumed less than an entire day but more than one-half day, I begin with the allocation of $2,000 with respect to the court time consumed. Next, I observe that, although the application did not involve a determination of the merits of any of the individual claims, it was determinative of the matter *qua* "class action proceeding". As such, I consider Tariff C(4) to be applicable.

[31] Therefore, I have considered the complexity of this application, and of class action certification proceedings in general. I have also considered the importance of the matter to the parties, and the amount of effort involved in preparing for and defending the application (largely on the basis of what can be reconstructed from the materials that have been filed with the court).

[32] To the first point, this matter was clearly not a complex one. The applicable law was not obscure. The issues were straightforward. To the other points, I note that the Plaintiffs produced ten affidavits in conjunction with their motion, including that of a proposed expert, Dr. Peter Copp. I also am cognizant that, following receipt of the Defendant's brief opposing certification, the Plaintiffs amended their pleadings. This, in turn, required responsive action by the Defendant, which included the preparation of an Amended Statement of Defence and supplemental brief in law.

Conclusion

[33] Having considered all of these factors, I am satisfied that a multiplier of four, fixed in accordance with Tariff C (4) would be appropriate. This results in a costs award of $8,000 to the Defendant. As no disbursements have been specifically mentioned, this award shall be inclusive of same.

Gabriel, J.